

July 3, 2007

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte*: In the Matter of Comcast Corporation's Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CSR-7012-Z, CS Docket No. 97-80.

Dear Ms. Dortch:

Over 435 days ago, Comcast filed a request for a waiver of the integration ban for three models of low-cost, limited-capability set-top boxes. Comcast's request fit to a "T" the guidance provided by the full Commission in its *2005 Integration Ban Order* regarding the filing of such waivers. The boxes for which waiver is sought include none of the advanced capabilities specifically referenced in that order.¹ In fact, these boxes are the lowest-cost, most limited-capability digital set-top boxes *that have ever been built* -- and, in the case of the DCT-700, one of the most popular with cable customers. But, on January 10, 2007, 266 days after the waiver was filed, the Media Bureau denied the Comcast request, flouting the Commission's clear directive about preserving a low-cost set-top box option for consumers and the Commission's subsequent statements to the D.C. Circuit promising to mitigate the harms of applying the integration ban to low-cost boxes.²

¹ See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd. 6794 ¶ 37 (2005) ("*2005 Integration Ban Order*") ("We do not believe waiver will be warranted for devices that contain personal video recording (PVR), high-definition, broadband Internet access, multiple tuner, or other similar advanced capabilities.").

² Comcast has detailed the legal, factual, and policy infirmities with the Bureau's order in its Application for Review and other filings in these proceedings. See, e.g., Comcast Application for Review, filed in CSR-7012-Z, CS Dkt. No. 97-80 (Jan. 30, 2007); Comcast Reply, filed in CSR-7012-Z, CS Dkt. No. 97-80 (Feb. 26, 2007). For example, Comcast has noted that the Bureau arbitrarily decided that waivers under the 2005 order should be limited to one-way devices, notwithstanding the facts that Comcast has never deployed such one-way digital cable set-top boxes, consumers have no interest in using such devices, and manufacturers have no interest in building them. The Commission acknowledges these very facts in its recent notice of proposed rulemaking on two-way plug-and-play devices, see *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Compatibility Between Cable Systems and* (footnote continued...)

With the six orders issued on June 29, 2007, the Media Bureau has now granted set-top box waivers to over 130 MVPDs. As Comcast has explained previously, in the event that the Commission decides to affirm the Bureau's decision denying the Comcast waiver request,³ the Commission is duty bound to explain not only why Comcast is being denied its waiver, but also how such a decision can be rationally justified while so many other waiver applicants are getting relief from the integration ban *for the very same box covered by the Comcast request (the DCT-700) or other two-way, low-cost, limited-capability boxes*.⁴ In short, the Commission must explain why it is discriminating in favor of the customers of certain MVPDs at the expense of customers of other MVPDs.

The waiver orders issued on June 29, 2007 underscore the arbitrariness and capriciousness of the current waiver process. A total of 12 waiver orders have been issued to date, and each order is based on distinctions that are divergent and not credible. In the orders issued earlier this year, the Bureau granted waivers based on the operator's commitment to go all-digital by or before February 17, 2009,⁵ based on the operator's "dire financial straits,"⁶ and based on the operator's early commitment

(...footnoted continued)

Consumer Electronics Equipment, Third Further NPRM, CS Dkt. No. 97-80, PP Dkt. No. 00-67, FCC 07-120 ¶ 5 & n. 12 (rel. June 29, 2007), and yet the Media Bureau continues to insist that "the Commission never contemplated that 'limited capability integrated digital cable boxes' would include devices with two-way functionality." See *In the Matter of Armstrong Utilities, Inc. et al. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Mem. Opin. & Order, CSR-7112-Z et al., CS Dkt. No. 97-80, DA 07-2916 ¶ 48 (rel. June 29, 2007) ("*Armstrong Waiver Order*"); see also *In the Matter of Comcast Corporation's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Mem. Opin. & Order, 22 FCC Rcd. 228 ¶ 26 (2007) ("*Comcast Waiver Order*").

³ Comcast's waiver petition was filed on April 19, 2006 (440 days ago), the Bureau issued its denial order on January 10, 2007 (174 days ago), and Comcast filed its Application for Review on January 30, 2007 (154 days ago). Yet, Comcast is still awaiting final Commission action on its waiver request, notwithstanding the statutory requirement that waivers be acted upon within 90 days. See 47 U.S.C. § 549(c). Comcast urges the Commission to act promptly on its Application for Review so, if necessary, Comcast can finally have its day in court.

⁴ The grant of so many waiver petitions covering the DCT-700 and other *two-way* digital set-top boxes with limited capabilities also casts substantial doubt on the Bureau's repeated claims that the 2005 *Integration Ban Order* should be construed narrowly to apply only to *one-way* digital cable boxes that do not exist in the marketplace. If the Commission really intended to limit waiver grants to one-way boxes, why then is the Bureau granting relief to dozens of MVPDs for the continued deployment of integrated two-way boxes?

⁵ See *In the Matter of BendBroadband's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Mem. Opin. & Order, 22 FCC Rcd. 209 (2007) (granting waiver for DCT-700 conditioned on commitment to go all digital by 2008); *In the Matter of GCI Cable Inc.'s Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Mem. Opin. & Order, 22 FCC Rcd. 8576 (2007) ("*GCI Waiver Order*") (granting waiver for DCT-700 and two other models of low-cost, limited-capability boxes conditioned on commitment to go all digital by February 17, 2009); *In the Matter of OneSource's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Mem. Opin. & Order, 22 FCC Rcd. 8567 (2007) (granting waiver for DCT-700 conditioned on commitment to go all digital by December 31, 2007).

⁶ See *In the Matter of Charter's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Mem. Opin. & Order, 22 FCC Rcd. 8557 (2007); but see UBS Corporate Report, *Initiation: Chartered to Outperform* (June 29, 2007) (recommending Charter shares based on expectation that Charter will have double-digit revenue growth, higher margin data and voice services, and increasing scale to drive double-digit increases in EBITDA).

to an idiosyncratic security technology.⁷ The waiver orders issued on June 29, 2007 add to the list of inconsistent and irreconcilable rationales for waiver grants for low-cost boxes:

- Guam Cablevision received a waiver through December 31, 2009 for the Explorer 1850 (a low-cost, limited capability box built by Scientific-Atlanta) based on the history of severe weather in Guam.⁸
- Armstrong Utilities and nine other petitioners received three-month waivers of the integration ban for low-cost and other digital set-top boxes based on the Bureau's inability to act in a timely manner on the waiver requests.⁹
- Liberty Cablevision of Puerto Rico and Choice Cable TV were granted waivers for low-cost, limited capability set-top boxes based on the fact that these operators have *already* completed the transition to all-digital networks.¹⁰

Moreover, the Bureau granted even broader relief to Verizon, Qwest, and other telco video providers. As explained in the *Omnibus Waiver Order*, none of these petitioners, including Verizon, has bothered to take *any* steps to come into compliance with the integration ban.¹¹ Yet, Verizon and these other providers are the beneficiaries of *both* a waiver for their low-end boxes through December 31, 2009 *and* a one-year waiver for their HD and DVR boxes.¹² In contrast, Comcast and many other

⁷ See *In the Matter of Cablevision's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Mem. Opin. & Order, 22 FCC Rcd. 220 (2007).

⁸ See *In the Matter of Guam Cablevision, LLC's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Mem. Opin. & Order, CSR-7193-Z, CS Dkt. No. 97-80, DA 07-2917 (rel. June 29, 2007).

⁹ See *Armstrong Waiver Order* ¶ 58 (granting waiver through September 1, 2007). The Bureau has not explained why this three-month deferral should be applied only to these ten petitioners, but not to Comcast and other NCTA members since the Bureau also failed to act on the NCTA waiver request in a timely manner. The NCTA waiver petition was filed on August 16, 2006 (three months or more *before* Armstrong and the other operators covered by the *Armstrong Waiver Order* filed their petitions) and the Bureau did not act on the petition until June 29, 2007 -- well beyond the 90-day time frame for deciding waiver requests under Section 629(c). See *In the Matter of NCTA Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Mem. Opin. & Order, CSR-7056-Z, CS Dkt. No. 97-80, DA 07-2920 (rel. June 29, 2007).

¹⁰ See *In the Matter of Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Mem. Opin. & Order, CS Dkt. No. 97-80, DA 07-2921 (rel. June 29, 2007) ("*Omnibus Waiver Order*") (also granting relief to certain traditional cable operators that committed to go all digital by or before February 17, 2009).

¹¹ See *id.* ¶ 61. See also Todd Spangler, *CableCard Ready -- or Not*, Multichannel News (June 25, 2007) ("Big cable operators have assumed they won't be receiving a pass from the FCC on the July 1 ban. Those companies and their vendors have scrambled over the last six months to get ready to meet the deadline. Verizon Communications does not appear to have done the same.").

¹² See *Omnibus Waiver Order* ¶ 61. In denying Comcast's waiver request for the DCT-700 and other low-cost, limited-capability boxes, the Bureau said Comcast "failed to demonstrate that the waiver will make any material difference in its 'migration to an all-digital network,'" see *Comcast Waiver Order* ¶ 30, and yet now grants, without explanation, relief (footnote continued...)

cable operators that have worked diligently to comply with the ban and are now deploying CableCARD-enabled boxes have been granted no relief, even for low-cost boxes. The Bureau asserts that this differential treatment for Verizon and the other telcos is warranted because “set-top manufacturers have not developed any non-integrated HD or DVR boxes for use with [IP, ATM, or hybrid QAM/IP] systems.”¹³ At least with respect to Verizon, this claim is preposterous. Verizon is an enormous competitor,¹⁴ began building its video services from scratch during the period when the separate security requirement was in effect, knew full well what its obligations were under the Commission’s rules, and has proven itself perfectly capable of controlling the design and development of equipment used in its FiOS TV network¹⁵ -- and yet apparently did nothing over the past three years to get boxes with separate security developed.¹⁶

Furthermore, the Bureau’s decision to grant waivers based on cable systems going “all digital” has no basis in the *2005 Integration Ban Order*, the navigation device proceeding generally, or in any other Commission precedent,¹⁷ nor does it appear to be consistent with proposals the Commission is now considering in other rulemakings. The simple fact is that a cable operator cannot transition to all digital without requiring customers to attach digital set-top boxes to all of their analog TV sets.¹⁸ Some customers will lease those digital boxes voluntarily, but almost certainly some will not. However, the Chairman has said, in the context of the pending dual must-carry rulemaking, that “I do not believe that every consumer should be forced to rent a set-top box” to view digital broadcast

(...footnoted continued)

from the integration ban (through December 31, 2009) for limited-capability boxes with respect to MVPDs that are *already* all digital.

¹³ *Omnibus Waiver Order* ¶ 61. Favoring Verizon and other telco providers in this way violates the Commission’s longstanding policy of competitive and technological neutrality. *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Rept. & Order, 20 FCC Rcd. 14853 ¶¶ 1, 3, 16 n.44 & 45 (2005).

¹⁴ *See Comcast Ex Parte*, filed in CSR-7012-Z, CS Dkt. No. 97-80, at 3 (May 17, 2007) (noting, among other things, that Verizon has more total annual revenues than the entire cable industry *combined* and a market capitalization greater than any cable operator). Verizon reportedly now has approximately 500,000 subscribers, *see* Steve Donohue, *Verizon Hits FiOS Milestone*, Multichannel News (June 25, 2007), and is larger than nine of the ten operators whose waiver requests were denied in the *Armstrong Waiver Order*.

¹⁵ For example, Verizon reportedly assumed control over software development in its set-top boxes when Microsoft fell behind schedule on that work. *See* Dionne Searcey and Robert A. Guth, *Verizon Reworks Microsoft Code For Its TV Boxes*, Wall St. J. (Sept. 14, 2006).

¹⁶ Verizon also acknowledges that its cable systems support CableCARD-enabled retail devices, *see* Verizon Comments, filed in CSR-7042-Z, CS Dkt. No. 97-80, at 22-23 (Aug. 8, 2006), and yet says it is incapable of supporting CableCARDS in its own set-top boxes.

¹⁷ *See, e.g., Comcast Application for Review* at 19-22.

¹⁸ Indeed, as a condition for getting an “all-digital” waiver, an operator must notify all of its analog customers of its plans to go all digital well in advance of the transition and also ensure that it has placed orders for enough boxes “to ensure that each of its customers can continue to view its video programming on their television sets.” *See, e.g., Omnibus Waiver Order* ¶ 62; *GCI Waiver Order* ¶ 17.

signals¹⁹ and that Commission action is needed to accomplish that result.²⁰ It would appear difficult, if not impossible, for a cable operator to satisfy its commitment to transition to an all-digital network by or before February 17, 2009 under such a rule.

The manner in which the June 29, 2007 orders were adopted further highlights the arbitrariness of the entire waiver process. For example, the *Omnibus Waiver Order* covers approximately 100 waiver petitions that were never put out for public comment by the Bureau.²¹ In contrast, the Comcast waiver request -- and every other waiver request decided before June 29, 2007 -- had been fully briefed by supporting and opposing commenters, consistent with the procedural requirements of Section 76.7 of the Commission's rules (the waiver provision under which the Bureau decided these requests).²² Likewise, two of the waiver petitions decided on June 29, 2007 had not even been entered into the Commission's ECFS database (let alone put out for public comment) prior to the issuance of the orders -- again, in contrast to how every other waiver request had been handled previously.²³

The treatment of the Verizon waiver request also raises serious questions about the integrity of the waiver process. Verizon filed its waiver request in August 2006, and public comments were filed on the request in September 2006. In neither its waiver petition nor its reply comments (or subsequent *ex parte* presentations to the Commission) did Verizon ever commit to go all digital by or before

¹⁹ Statement of Chairman Kevin J. Martin, *Cable Carriage of Television Broadcast Signals*, Second Further NPRM, CS Dkt. No. 98-120 (Apr. 25, 2007)

²⁰ See Letter from Chairman Kevin J. Martin to the Honorable John Dingell and the Honorable Ed Markey, at 3 (June 18, 2007) ("Importantly, I do not believe that every consumer should be forced to rent a set-top box to access broadcast television. Many consumers do not want the expense or hassle of having to get a set-top box. Instead, the cable operator should ensure that all of its customers have access to the broadcast signals, including those customers that do not want to rent a digital box. Commission action is needed to ensure that cable subscribers will not be forced to rent a set-top box to view the broadcast signals.").

²¹ These include the various MVPDs covered by the Rural ATM Digital Providers Group Petition (which was filed on April 24, 2007, but never put out for public comment) and the IPTV Operators Group Petition (which was filed on June 1, 2007, but never put out for public comment).

²² See 47 C.F.R. § 76.7 (establishing notice-and-comment procedures for waiver petitions). The Bureau also failed to explain why these waiver petitioners moved to the head of the line while other waiver petitions, which have been pending for as long as seven months, were not decided before the July 1 deadline. For example, the RCN waiver was filed on December 5, 2006 and the JetBroadband and WideOpenWest waivers were filed in late February 2007, but these requests have yet to be decided.

²³ In particular, neither the Massillon waiver request nor the City of Crosslake deferral request were posted in Docket 97-80 on ECFS, but both were decided on June 29, 2007. See *In the Matter of Massillon Cable TV, Inc., Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Mem. Opin. & Order, CSR-7229-Z, CS Dkt. No. 97-80, DA 07-2919 (rel. June 29, 2007); *In the Matter of The City of Crosslake, Petition for Deferral of Enforcement of the July 1, 2007 Deadline in 47 C.F.R. § 76.1204(a)(1)*, Mem. Opin. & Order, CSR-7348-Z, CS Dkt. No. 97-80, DA 07-2918 (rel. June 29, 2007).

February 17, 2009.²⁴ Curiously, Verizon finally made that commitment in an *ex parte* filed with the Commission on June 29, 2007 -- *the very same day it received its waiver grant*.²⁵

The Bureau has engaged in these legal and procedural gyrations notwithstanding the fact that the Commission's 2005 *Integration Ban Order* and the underlying statute contemplate that all parties -- and their customers -- will be treated equally. The Commission's statements in its 2005 order about granting waivers for low-cost, limited-capability set-top boxes reflected an intention to focus on the characteristics of the device, not the identity of the provider.²⁶ Moreover, the waiver standard in the navigation device statute directs that any waiver granted to one party "shall be effective for *all* service providers and products in that category and for *all* providers of services and products."²⁷

The Commission promised the D.C. Circuit that it would mitigate the harms associated with the integration ban by preserving a low-cost set-top box for cable consumers.²⁸ By its decisions to preserve the low-cost box option just for *some* MVPD customers -- based on where they live and which provider they choose -- the Commission is not following through on its statements to the court. Consistent with its representations to the court (and the plain language of the 2005 order and the Communications Act), the Commission must give *every* MVPD customer, including Comcast customers, the option of using a low-cost digital set-top box.²⁹

²⁴ In fact, in an *ex parte* letter filed on May 31, 2007, Verizon acknowledged that its FiOS TV service was *not* all-digital (since it continued to deliver channels in analog) and that its waiver request was *not* based on an all-digital rationale. See *Verizon Ex Parte*, filed in CSR-7042-Z, CS Dkt. No. 97-80 (May 31, 2007); see also *Comcast Ex Parte*, filed in CSR-7042-Z, CSR-7012-Z, CS Dkt. No. 97-80 (May 17, 2007) ("Verizon's FiOS TV network is *not* 'all-digital' as that phrase has been used in the recent Bureau orders granting waivers to BendBroadband, GCI, and OneSource.").

²⁵ See *Verizon Ex Parte*, filed in CSR-7042-Z, CS Dkt. No. 97-80 (June 29, 2007). The *ex parte* letter did not become publicly available until July 2, 2007. Moreover, the *ex parte* letter states that a telephone conversation occurred between a Verizon representative and a legal advisor for Chairman Martin that very morning, but does not explain who initiated the phone call.

²⁶ See 2005 *Integration Ban Order* ¶ 37.

²⁷ 47 U.S.C. § 549(c) (emphasis added).

²⁸ See FCC Brief at 14, 30 & note 28, *Charter v. FCC*, No. 05-1237 (D.C. Cir. Mar. 7, 2006); Oral Argument Transcript at 21, *Charter v. FCC*, No. 05-1237 (D.C. Cir. May 11, 2006).

²⁹ Moreover, as Comcast also pointed out in its May 17 *Ex Parte*, the Commission's implementation of the navigation device statute has created competitive inequities in the MVPD marketplace. The navigation device statute by its terms applies equally to *all* MVPDs, yet the integration ban is being applied to a limited -- and shrinking -- subset of competitors. See *Comcast Ex Parte*, filed in CSR-7012-Z, CS Dkt. No. 97-80, at 4 (May 17, 2007).

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Kindly direct any questions regarding this matter to my attention.

Sincerely,

/s/ Jonathan Friedman
Jonathan Friedman
Counsel for Comcast Corporation